

RESPONSE REQUESTED - ~~HAB~~

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No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

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ALEXANDER L. STEVAS  
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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

STATE OF TENNESSE,  
Petitioner,

vs.

HARVEY J. STREET,  
Respondent.

On Petition for a Writ of Certiorari  
to the Court of Criminal Appeals  
of Tennessee at Knoxville

RESPONSE TO  
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant's confrontation rights are violated when the unredacted confession of a non-testifying, yet available, accomplice is read to the jury?

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OPINION BELOW

The opinions of the Court of Criminal Appeals of Tennessee and the order of the Supreme Court of Tennessee appear in the appendix to the petitioner's brief.

STATEMENT OF THE CASE

The Respondent adopts the Petitioner's recitations of the facts of the case with the following elaborations which render a more complete version.

Although Clifford Peele was in the Unicoi County Jail--located in close proximity to the courthouse--at the time of Mr. Street's trial, the State of Tennessee made no attempt to call Clifford Peele as a witness to impeach Mr. Street's testimony. Moreover, the State made no effort to redact the portions of Peele's confession which implicated Mr. Street.

REASONS FOR DENYING THE WRIT

The Tennesse Court Of Criminal Appeals Correctly Found A Violation Of The Confrontation Clause In The Introduction Of An Available Nontestifying Accomplice's Confession And Correctly Declined To Create A Novel Exception To The Right Of Confrontation.

The State of Tennessee has presented the instant case as a situation requiring application of the "interlocking confession" doctrine purportedly adopted in the case of Parker v. Randolph, 442 U.S. 62 (1979). A review of the facts and the pertinent authority reveals, however, that the case does not fall within the scope of the Parker decision. Rather, it involves a straightforward question regarding confrontation of adverse witnesses.

In the instant case, the respondent,



Harvey Street, and his alleged accomplices were tried separately. When Mr. Street took the witness stand in his own defense, the State felt that it could impeach his testimony with the statements of Clifford Peele, an alleged accomplice. Although Peele was incarcerated nearby in the Unicoi County Jail, the State did not seek to bring him forward as a rebuttal witness. Rather, the State elected to introduce Peele's statements through the testimony of Sheriff Papantoniou.

This scenario presents a classic violation of the right of confrontation. The clause was adopted to prevent the use of ex parte affidavits and depositions in lieu of available witnesses in criminal trials. As noted by the Court in Mattox v. United States, 156 U.S. 237, 242 (1895):

The primary objective of the constitutional provision in question [the sixth amendment] was to prevent depositions of ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of personal examination and cross-examination. . . ."

The clause affords defendants the opportunity to face their accusers, and allows the judge and jury to view the witness' demeanor to aid them in determining the reliability of the testimony. As noted by the Mattox Court:

the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id.

This is precisely the situation presented in the instant case. The State chose to

introduce testimony through a third party; thus circumventing personal examination and cross-examination of the statement-maker. The case of Barber v. Page, 390 U.S. 711 (1968), is instructive in this regard. In Barber, the State was allowed to introduce the preliminary hearing testimony of an accomplice who was incarcerated in federal prison. The testimony incriminated the defendant and, predictably, he was convicted of armed robbery. The Court, however, reversed the conviction because the defendant's confrontation rights had been violated. The Court stated:

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Id. at 721 (quoting Pointer v. Texas, 380 U.S. 400, 405 (1965)).

Moreover, significant in the Court's decision was the observation that the State made no effort to procure the presence of the absent witness at the defendant's trial. Clearly, the instant situation is controlled by Barber. In both cases, the State circumvented the mandates of the sixth amendment confrontation clause by introducing third party testimony without making any effort to secure the presence of the statement-maker.

The State has sought to avoid the clear confrontation clause issue by characterizing this case as an "interlocking confession" case, governed by the plurality opinion of Parker v. Randolph, supra. This analysis is flawed for several reasons. First, the Parker decision is inapplicable because that

case involved a joint trial where the codefendants made interlocking confessions. Since the codefendants each exercised their constitutional rights not to testify they were "unavailable" to render direct testimony. The State was faced with the situation where it could not put the individual statement-makers on the stand. In the instant case, however, the statement-maker, Peele, was available to render direct testimony.

Second, the Parker case is inapplicable because the per se rule regarding "interlocking confessions" was not adopted by the majority. Four members of the Court embraced the per se rule and four members rejected the per se rule. Justice Rehnquist wrote for the plurality, in which he was joined by Chief Justice Burger and Justices Stewart and

White. Justices Stevens, Brennan, and Marshall rejected the per se rule in dissent. Justice Blackmun also rejected the per se rule, but concurred in the result because he felt that the situation was governed by the doctrine of "harmless error."

Most importantly, however, the Parker decision is of dubious precedence because the plurality found that the right to confront adverse witnesses would prove of little value to a person who allows his own incriminating confession to stand before the jury unchallenged. As observed by Justice Rehnquist:

Successfully impeaching a co-defendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged.

Id. at 73 (emphasis added). In the instant case, however, Mr. Street specifically took



the stand to assert an alibi defense and contest the validity of his confession. By challenging his alleged confession in this manner, the right to cross-examine his accuser, Peele, became critical. The crucial issue was the determination of who was speaking the truth: Peele or Street.

Street was before the jury, available for cross-examination and scrutiny of demeanor in order to gauge the veracity of his statements. Peele, on the other hand, was incarcerated in a nearby jail. His statements were presented to the jury through the sheriff. Thus, there was no means by which the jury could effectively gauge the veracity of Peele.

The State has attempted to expand the "interlocking confession" doctrine to those instance where the complaining defendant has

taken the stand and challenged the voluntariness and reliability of his alleged confession. It is submitted that this not only makes Parker inapplicable but also renders confrontation with an accomplice, whose contrary statement is spread before the jury without benefit of cross-examination, crucial.

The State suggests that no error accrued to Street because Peele's statement was used solely to impeach Street's contrary testimony. The State also points out in its version of the Statement of the Facts that the jury was instructed to not consider Peele's statement for the truth of the matter asserted and that "the State's references to Peele's statement during closing arguments were also carefully limited to its impeachment value." (Brief for Petitioner at 5) It

is submitted, however, that the foregoing justification for introduction of Peele's confession in this manner is a mere guise for introducing incriminating testimony from a purported eyewitness without risking cross-examination of that witness. Indeed, as observed by the Tennessee Court of Criminal Appeals:

A close examination of the circumstances surrounding admission of this confession into evidence without calling the confessor to the stand reveals no valid state interest that is served. Although Peele was in jail awaiting trial when the confession was introduced, the state made no effort to call him to testify. Nor was an effort made to limit prejudice to the defendant by redacting incriminating portions of the confession. From an examination of the confession, this could have done without detracting from the alleged purpose for which the confession was introduced. One cannot help but conclude that introduction of this unedited confession was merely a transparent attempt to condemn defendant from another source without allowing the veracity of the source or the con-

fession to be tested by cross-examination.

Appendix to Brief for Petitioner at 9  
(emphasis added).

In the case of Douglas v. Alabama, 380 U.S. 415 (1965), the defendant and his accomplice, Loyd, were tried separately. Loyd was called to testify at the defendant's trial, but he invoked his privilege against self-incrimination when questioned about the incident. The prosecution then, under the pretense of "refreshing" Loyd's memory read Loyd's confession to the jury. Since the confession implicated the defendant, the Court held that reading it to the jury denied the defendant his sixth amendment right of confrontation. Similarly, the introduction of Peele's statement, in the instant case, under the guise of "impeachment" cannot be

justified. In both cases, even though the confession was not technically introduced for the truth of the matter asserted, it nevertheless had the practical effect of direct testimony.

The "mere impeachment" justification for introduction of this damning testimony is further belied by the fact that the State made no effort to redact the portions of Peele's confession which incriminated Mr. Street. As noted by the Tennessee Court of Criminal Appeals, this could have been done so as to minimize the damage to the defendant without detracting from the purported "impeachment" purpose for which the confession was introduced. (Appendix to Brief for Petitioner at 9)

Finally, the State makes the following allegation:

The lower court's decision is even more disturbing in that it allows a defendant to use the confrontation right to distort the truth-finding function of the criminal trial. Street will now be able to take the stand and make his false claim that he was forced to parrot Peele's confession, confident in the knowledge that the State will be unable to impeach him with the confession itself.

(Brief for Petitioner at 7-8) This impassioned distortion of the probable consequences of recognizing Mr. Street's sixth amendment claim does not withstand even the most cursory scrutiny. For example, application of the confrontation clause enhances, rather than perverts, the truth-finding function of the criminal trial. It allows the finder of fact to gauge the veracity of a criminal defendant's accuser before accepting his statement. This is particularly true where, as in the instant case, the defendant's ver-



sion of the incident and the accuser's version of the incident are contrary.

The assertion that Mr. Street can now take the stand and lie with impunity is patently absurd. First, "his false claim that he was forced to parrot Peele's confession" could easily be rebutted with the testimony of the sheriff who was present, if the State indeed feels that this aspect of Street's testimony was false. Secondly, and perhaps most critically, the State could avoid the entire confrontation problem by bringing forth Peele as a witness. It is understandable that the State preferred to introduce Peele's statements through a sheriff rather than an accused felon. No doubt Sheriff Papantoniou was a better and more credible witness than Peele. Nevertheless, the confrontation clause does not sanction the use of ex parte

depositions in lieu of direct testimony. The clause was adopted specifically to provide criminal defendants the opportunity to address the veracity of their accusers.

At one time, it was felt that guaranteeing the opportunity to face one's accuser and subject him to cross-examination would impede, albeit "distort", the truth-finding function of the courts. The common belief was that "so many horsestealers may escape, if they may not be condemned without witnesses." 2 Howell, A Complete Collection of State Trials 18 (London 1819). The sixth amendment of the confrontation clause, however, was specifically adopted to permit criminal defendants the opportunity to face their accusers. In the interest of securing fundamentally fair trials, it has been uniformly held that the right of confrontation

and cross-examination must be maintained:  
even though by doing so the State will risk  
allowing "so many horsestealers" to escape.

CONCLUSION

For the reasons herein stated, the respondent urges this Court to deny the writ of certiorari.

Respectfully submitted,

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